In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THOMAS A. DELANEY, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 354.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case grows out of a widespread and aggravated conspiracy at Milwaukee, Wisconsin, to violate the National Prohibition Act, which resulted in the conviction of some thirty defendants for the conspiracy and for the bribing of various Prohibition and Revenue officers.

Petitioner was the Federal Prohibition Director for the State of Wisconsin, who had charge of the administrative and regulative branches for the enforcement of the National Prohibition Act. Defendant Ray, who was tried and sentenced with him, was an inspector in petitioner's office, having been appointed to that position by the latter. (R. 136.)

77375—23—1

On October 26, 1921, the indictments here in question were filed in the District Court for the Eastern District of Wisconsin, charging petitioner and others with conspiracy to violate the National Prohibition Act. They bear numbers 348 H and 350 H, respectively, and the defendants named therein are:

348 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice.

350 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice; Walter M. Burke.

Each indictment charges the defendants with having entered into a conspiracy unlawfully to deal in certain quantities of whiskey for beverage purposes and with having conspired to make false reports and records to conceal the unlawful transactions. (R. 2, 6.) The indictments contain a large number of overt acts.

Those in No. 348 H set forth the execution by Dudenhoefer, jr., of false Treasury Department permits, Form 1410, in the name of various pretended purchasers of whiskey; the sale of quantities of liquor by the Dudenhoefers; the transfer of large sums of money from the Dudenhoefers to Giudice and the division of such sums of money by Giudice with petitioner and Ray. (R. 3–5.)

The overt acts in indictment No. 350 H set forth conferences of Burke with Giudice and Dudenhoefer, jr.; the delivery by Burke to the Dudenhoefers of a

permit Form 1410; the execution by Dudenhoefer, jr., of permits Form 1410 by using the names of pretended purchasers of whiskey; the withdrawal by the Dudenhoefers of large sums of money from a bank; the transfer of large sums of money by Dudenhoefer, sr., to Giudice; the division of such sums of money by Giudice with Ray and petitioner, and the delivery of a large sum of money by Dudenhoefer, jr., to Ray. (R. 7, 10.)

The Dudenhoefers pleaded guilty to both indictments. Giudice died before the date of trial. The Government did not, at that time, proceed against the Corporation and Burke, but moved for trial against petitioner and defendant Ray.

Without objection the two indictments were consolidated for the purpose of trial. (R. 13.) Trial was had before Judge Geiger and a jury (R. 13–33), and a verdict of guilty returned against both petitioner and Ray upon each indictment (R. 15–16). Upon such verdict judgment was entered and sentence of imprisonment in the penitentiary for two years and a fine of $10,000 imposed upon each defendant, pursuant to the following order: "It is ordered by the court that for the purpose of judgment and sentence, cases number 348 Criminal H and 350 Criminal H be considered as one case." (R. 32.) Both defendants joined in a writ of error covering both cases (R. 205–213), and the cause came before Circuit Judges Baker, Evans, and Page, who affirmed the judgments, without opinion (R. 216–217). A petition for rehearing was denied. (R. 234.)

Thereupon petitioner filed a motion to vacate orders theretofore entered in the cause, upon the ground that Judge Evans was disqualified, under the provisions of section 120, Judicial Code, from sitting in the Circuit Court of Appeals, because (a) he had theretofore presided at the trial of one Arthur Birk in another, but allied, case; (b) had passed upon a motion filed by a codefendant to quash indictment 350 H found against petitioner, said codefendant and others, and (c) had taken part in the deliberations by the several judges in the trial court respecting the penalties to be inflicted upon petitioner and his codefendants. (R. 235.) The petition was denied. (R. 249.)

A petition for a writ of certiorari was subsequently granted by this court (262 U. S. 742), and the case is here on the return to that writ.

ISSUES PRESENTED.

Aside from the alleged disqualification of Judge Evans, petitioner contends his conviction should be set aside because it was based on hearsay evidence, and because there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial court.

The single instance of alleged erroneous admission of hearsay evidence is found on page 77 of the record in respect to the question which Dudenhoefer, sr., was asked as to what his son told him that Giudice had said. This evidence was clearly admissible as the statement of a conspirator in respect to matters comprehended within the conspiracy, but even if not

admissible, it was unimportant and, when compared with the volume of other evidence, was not prejudicial to petitioner. The admission, even if erroneous, did not affect the rights of petitioner.

As to the matter of proof, the facts in this case so fully sustain the verdict of the jury, and the record so conclusively demonstrates the guilt of petitioner, that we assume that this court granted the writ of certiorari not because it thought petitioner was not properly convicted, but because it had some doubt as to whether the Circuit Court of Appeals was properly constituted. The Government will, therefore, confine its argument to the latter point.

ARGUMENT.

I. *Proceedings had under various indictments.*

II. *Judge Evans's action in ruling on the motion of Burke to quash did not disqualify him from sitting in the Circuit Court of Appeals on the hearing of petitioner's writ of error.*

III. *There being no question as to Judge Evans's qualification to sit in review of case 348 H, the question as to his disqualification in 350 H is moot.*

I.

Proceedings had under various indictments.

To aid the court in properly understanding the facts in this case, and in order to demonstrate the erroneous contentions of petitioner based thereon, reference is made to the series of indictments Nos. 325 H, 317 H, 322 H, 318 H, 321 H, 327 H, and 320 H, and the defendants named therein, referred to on pages 247–248 of the record.

As will be observed, these indictments were filed June 24, 1921. Petitioner was not a party to or mentioned in any of them. The indictments against him and upon which he was convicted (Nos. 348 H and 350 H now before the Court) were returned by a subsequent grand jury on October 26, 1921 (R. 1, 6), several months later than those referred to above. For convenience, the names of the defendants in the last two indictments will again be given:

No. 348 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice.

No. 350 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice; Walter M. Burke.

In No. 348 H no one was named as defendant who was a defendant in any of the indictments returned June 24, 1921. In No. 350 H, Walter M. Burke is the only defendant who is named in any of the indictments returned by the former grand jury in June, 1921. That the defendants in indictment No. 350 H, with the exception of Burke, are not the same as in the earlier indictments, is due to the fact that the two sets of indictments grow out of different transactions, although related to the same general conspiracy. The crimes charged in the two sets of indictments are not the same.

In each of the cases in which he was named defendant, including No. 350 H, Walter Burke filed

motions to quash the indictment. Case No. 322 H was pressed to trial and, an affidavit of prejudice having been filed against Judge Geiger, the motion to quash in that case, No. 322 H, was argued before Circuit Judge Evans, who was designated to sit in the trial court. Judge Evans denied such motion to quash and thereupon orders denying like motions were entered pro forma in each of the other cases, including No. 350 H. (R. 249.)

Petitioner was not a party defendant in case No. 322 H, *nor did he move to quash the indictment in case 350 H, and in case 348 H no question upon the indictment was raised, either prior to or during the trial, by any defendant named therein.*

The record does not support petitioner's allegation that during the trial of Arthur Birk, Judge Evans passed upon facts and circumstances which involved and implicated petitioner, or that petitioner's name was repeatedly mentioned in a prejudicial manner. (Petitioner's brief, pp. 4, 20.) On the contrary, the record shows that petitioner was not a party to or in any way involved in indictments Nos. 318 H and 321 H, in which Birk was named defendant, or in any of the other indictments returned in June, 1921.

The record also negatives the allegation that Judge Evans deliberated with District Judges Geiger and Anderson respecting the penalties to be imposed upon the several defendants, including petitioner. (Petitioner's brief, pp. 5, 20.) There is nothing whatever indicating that Judge Evans in any way

passed upon the sentence to be imposed upon petitioner. This is a bold assumption on his part relative to the subject matter of a strictly confidential and privileged conference, and the assumption is entirely unwarranted by the facts. It may be assumed that Judge Evans conferred, if at all, with respect to the punishment to be imposed upon the defendants sentenced by him, to wit, Feuer, Grosscurth, Erler, Birk, Jacobson, and Gordon (R. 236), one of whom, at least, was tried before him (R. 236), and possibly some of the others, because of the affidavit of prejudice filed against Judge Geiger (R. 249). All were parties defendant in the indictments returned in June, 1921. Petitioner was not involved in any of those indictments, but was tried and sentenced, as before stated, by Judge Geiger.

It is submitted that the record discloses a situation in which it was proper, if not absolutely necessary, in view of the extended trials, numerous defendants, and affidavits of prejudice filed, for the judges to confer respecting the sentences to be imposed upon the defendants tried before them upon indictments closely allied, but in none of which petitioner was a party or otherwise interested.

It is not clear to whom petitioner refers in his petition to vacate (R. 236) by the use of the term "said codefendants" in his allegation regarding the deliberation of the judges above referred to. But the allegation is not in accordance with the facts, whether he refers to the defendants named in indictments Nos. 318 H and 321 H returned June 24, 1921,

or to the codefendants of petitioner in indictments 348 H and 350 H. With the exception of Walter Burke, the other persons named in indictments Nos. 318 H and 321 H were not codefendants with petitioner. The codefendants of petitioner in Nos. 348 H and 350 H, other than Walter Burke, were none of them named in any of the indictments returned in June, 1921, upon the trials of which the judges petitioner refers to presided.

As above stated, a motion to quash the indictment in No. 350 H was filed by defendant Walter Burke. A similar motion to a similar indictment was argued before Judge Evans and by him denied, and thereupon like entries and orders were made in ea h of the cases in which like motions had been made, including case 350 H. (R. 249.) The only question really presented is whether such action by Judge Evans entitled the petitioner to an order vacating the orders theretofore entered by the Circuit Court of Appeals in his case.

II.

Judge Evans's action in ruling on the motion to quash did not disqualify him from sitting in the Circuit Court of Appeals on the hearing of petitioner's writ of error.

(A.)

Section 120 of the Judicial Code provides:

> No judge before whom a cause or question may have been tried or heard in the district court * * * shall sit on the trial or hearing of *such* cause or question in the circuit court of appeals.

It is conceded that a decision rendered by a court constituted contrary to this statutory provision, if not absolutely *coram non judice* and void (Freeman on Judgments, sec. 146) at least will be vacated and the cause remanded for determination before a properly constituted court. (*Moran* v. *Dillingham*, 174 U. S. 153, 158.) But the Government insists that the facts in this case do not bring it within the inhibitions of the statute.

The decisions of this court construing this statute declare that the purpose of Congress in enacting the same was to require that the circuit court of appeals be composed of judges none of whom will be required to pass upon the merits of his own rulings in the court below. The statute is meant to prohibit a judge from sitting upon the circuit court of appeals only when the appeal will require him to pass upon a question decided by him in the trial court. He is not disqualified when, as here, there is no question for review in the appellate court upon which he passed in the court below.

In *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, this court said (pp. 343–344):

> Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of *any ruling of his own* made in the progress of the cause in the court of first instance. * * *
>
> The *sole criterion* under the statute is, does the case in the Circuit Court of Appeals

> *involve a question* which the judge has tried or heard in the course of the proceedings in the court below?

In *Moran* v. *Dillingham*, 174 U. S. 153, it is said (pp. 156–157):

> The intention of Congress * * * manifestly was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance.

In *Case* v. *Hoffman*, 100 Wis. 314, 352, the Supreme Court of Wisconsin, of a similar statute, said (p. 352):

> It is manifestly founded upon the idea that in an appellate court the parties are entitled to have a hearing before a bench, none of whose members has previously passed upon *the matter in issue*, or upon any material part thereof.

The fact that one of the judges of the Circuit Court of Appeals sat at some stage of the case in the court below does not necessarily disqualify him. In the *Rexford* v. *Brunswick-Balke Co. case, supra*, one of the judges of the appellate court sat in the court below, but no question being raised in the appellate court upon the merits of his ruling in the trial court, it was held that he was not disqualified to act in the appellate court. He was not placed in a position of being called upon to review his own rulings and decisions. Such is the sole test, as stated by this court in that case.

Applying the decision in the Rexford case and the language used by this court therein to the facts here.

it is submitted that the record discloses that Judge Evans was not disqualified, because it clearly appears that he was not called upon in the appellate court to pass upon his own ruling denying the motion of Walter Burke to quash the indictment in case 350 H.

Petitioner and his codefendant Ray, as heretofore stated, were the only defendants tried upon indictment 350 H. After Burke's motion to quash had been denied, he dropped out of the case. So far as the record shows, Burke never brought the question raised by him upon this indictment before the Circuit Court of Appeals. As disclosed by the record, petitioner never moved to quash the indictment and never raised any question concerning it by demurrer or otherwise. Nor was any motion to quash made or demurrer filed by any defendant other than Burke. The assignments of error of petitioner and his codefendant Ray are devoid of any reference to any error of the trial court in ruling upon any motion to quash or other objection to the indictment. Indeed, no such error could be saved for review, because neither petitioner nor Ray ever raised such question in the trial court. This being true, and the appellate court, upon the writ of error, being called upon to review only alleged errors in the rulings of the trial court, how can it be seriously contended that Judge Evans, as a member of the Circuit Court of Appeals, passed upon the merits of his ruling upon the motion of Burke? On the record, petitioner never asked either the trial court or the Circuit Court Appeals to pass upon the indictment. Burke asked the trial

court for a ruling thereon, but the ruling on Burke's motion was not and could not be saved to petitioner. Had petitioner thought there was merit in Burke's motion to quash and had he desired to save that question for the appellate court, he had ample time after the ruling on such motion and before the trial of his own case to do so. (R. 1, 14, 236.)

It is therefore respectfully submitted that the case i the Circuit Court of Appeals involved no question which Judge Evans heard in the trial court, and that applying the test laid down in the Rexford case he was not disqualified.

B.

The decisions relied on by petitioner are not applicable to the facts in this case, and therefore are not controlling.

In the case of *Oakley* v. *Aspinwall*, 3 N. Y. 547, the Judge was admittedly within the prohibited degree of consanguinity to one of the interested parties.

In *Case* v. *Hoffman*, 100 Wis. 314, 352, the court discussed at length the issues involved in the decision of Judge Newman when on the circuit bench and found that he there passed upon the identical question that he reviewed on appeal as a member of the Supreme Court. The facts brought the case clearly within the statute.

In *Van Arsdale* v. *King*, 152 N. Y. 69, appeal was taken from an order denying a motion to vacate an order granting leave to sue on the ground that the

original order was irregularly issued. In the course of its opinion the court says (p. 71):

> It is thus apparent from his own statement that he was sitting in review of an order made by him.

So this case is not applicable.

In *Moran* v. *Dillingham*, 174 U. S. 153, 157–158,

> The order appointing Dillingham and Clark receivers * * * the order allowing Dillingham for his services as receiver the sum of * * * the final decree of foreclosure and sale, and the decrees for delivery of possession to the purchasers, were all made by Judge Pardee; and the appeal, in the hearing and decision of which he took part * * * involved a consideration of the scope and effect of his own order.

Clearly, the facts of this case bring it within the provisions of the statute and within the test applied in *Rexford* v. *Brunswick-Balke Co.*, *supra*.

In *Cramp & Sons* v. *International C. M. T. Co.*, 228 U. S. 645, a decree was entered on a bill in equity, and on appeal the judge entering the decree sat as a member of the Circuit Court of Appeals. It was urged that the decree was entered pro forma and without consideration of the merits, but this court held that an adjudication on the merits by the court of first instance foreclosed any contention that the merits were not considered. In this case every question before the appellate court was decided in the trial court by one of the judges who sat in the Circuit Court of Appeals. Therefore it is not controlling.

In *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, a question was raised as to whether this section prohibited a judge from sitting on an appeal which was not from his own order, but from an order setting aside his order. The court did not hold he was so prohibited, but granted a rule to show cause why a writ of certiorari should not issue for the purpose of determining the question. The court did not adopt the procedure that was taken in *Cramp & Sons* v. *International C. M. T. Co.*, *supra*, which was also before this court upon application for writ of certiorari, but in which case the court reviewed and remanded so that the case could be heard by a competent court. The fact that the court in the American Construction Company case did not take such procedure evidences that in its opinion the case was not within the strict letter of the statute. A judge sitting on appeal from an order setting aside his own order is not reviewing his own decision within the strict letter of the statute, yet if the order setting aside is based upon some irregularity in the original order, it is the practical equivalent thereto. But it is one thing strictly to enforce the requirements of the statute in any case which falls within its scope and an entirely different matter to enlarge the scope of the statute by construction. The whole trend of this court's decisions is to the effect that the statute only prohibits a judge from sitting in review on questions he himself has decided in the court below.

Oakley v. *Aspinwall, supra,* is a leading case and is cited in most of the decisions bearing upon the disqualification of a judge, yet in the case of *Philips* v. *Germania Bank,* 107 N. Y. 630, the same court held that a judge sitting on appeal from an order vacating an order made by him was not reviewing his own decision.

In *Rexford* v. *Brunswick-Balke Co., supra,* the judge who denied a motion to remand sat on review of the judgment in the Circuit Court of Appeals. No error was predicated upon the ruling of the judge denying the motion to remand. The case turned upon that point. The judge was held qualified. The decision demonstrates that the question is not whether one of the judges sat at some stage of the proceeding in the court below, but whether, as a member of the appellate court, he is called upon to review a question which he heard and decided in the court below.

We submit that the decision in the Rexford case is decisive of the question here presented, because although Judge Evans decided the motion of Burke as the judge who sat in the Rexford case decided the motion to remand, no error was predicated upon the ruling of Judge Evans, as no error was predicated in the Rexford case upon the order denying the motion to remand, and the Circuit Court of Appeals accordingly in this case, as in the Rexford case, was not called upon to review any order or ruling made by any of its members while sitting in the trial court.

III.

There being no question as to Judge Evans's disqualification to sit in review of case No. 348 H, the question as to his disqualification in 350 H is moot.

As above stated, petitioner was tried and convicted upon two separate indictments, Nos. 348 H and 350 H, respectively. Without objection on his part, on motion of the district attorney, the indictments were consolidated for convenience of trial. (R. 13.) A separate verdict of guilty was returned upon each indictment. (R. 15–16.) Motion for a new trial was made in each case. (R. 17.) Judgment and sentence of two years and a fine of $10,000 was imposed *in each case*. (R. 32.) While the judgment for the purpose of sentence treats both cases as one, it was so worded for the purpose of showing concurrence only, and the judgment and sentence was imposed in each case. A bill of exceptions was entitled in both cases. (R. 33.) Separate writs of error were not applied for or issued, but this irregularity apparently was waived by the appellate court.

Brown v. *Spofford*, 95 U. S. 474.

Louisville & Nashville Ry. Co. v. *Summers*, 125 Fed. 719, 720.

Waters-Pierce Oil Co. v. *Van Elderen*, 137 Fed. 557, 562.

Tosh v. *West Kentucky Coal Co.*, 252 Fed. 44, 46.

Whether or not the Circuit Court of Appeals should have considered the cases separately and rendered separate judgments, or whether it treated and dis-

posed of them as one case, the judgment rendered by it must be separately applied in the trial court.

Brown v. *Spofford, supra*, p. 485.
Myrick v. *United States*, 219 Fed. 1, 11, 13.

In case 348 H none of the defendants ever raised any question upon the indictment by demurrer, motion to quash, or otherwise. Walter Burke was not a party defendant in said action. Judge Evans never sat at any stage of the proceedings in case No. 348 H. Accordingly, there is no possibility for the application of the provisions of section 120, Judicial Code, to the hearing upon the writ of error in this case, admitting for the sake of argument that the section may be applicable to 350 H. The cases are separate and distinct, upon separate indictments, verdicts, and judgments, and the order of the Circuit Court of Appeals affirming the judgment and sentence in 348 H must stand as against any attack directed upon the judgment of that court in 350 H. The judgment and sentence of the trial court is the same in each case, to be served concurrently. The judgment and sentence in 348 H therefore remaining intact, it is idle to reconsider the case upon indictment 350 H. The question, assuming there be one, is moot.

The same rule should apply here that is applied in sentences upon several counts in the same indictment. If the judgment and sentence of the court can be justified upon any one count, it is immaterial what error was committed upon other counts. *Powers* v. *United States*, 223 U. S. 303; *Abrams* v. *United States*, 250 U. S. 616. So it is really of no moment whether the court below considered the cases sever-

ally or treated them as one case, or whether the judgment rendered by that court must be separately applied by the trial court, as stated in *Brown* v. *Spofford, supra*. If, in view of the single writ of error, the court below considered them as one case, the trial court must enter and separately apply the judgment. There being no attack, and no grounds for attack, upon the judgment in No. 348 H it must stand as entered. Again, if the court below considered them as one case, it undoubtedly could, in one judgment, have reversed on one indictment and affirmed upon the other, as it could upon separate counts in the same indictment, under the rule that if the judgment and sentence is justified upon any count of an indictment, error upon other counts is of no consequence. If, on the other hand, the court below treated the cases severally, the judgment of affirmance in No. 348 H stands in any event, and the question raised upon 350 H becomes immaterial.

Clearly, the conviction and sentence of petitioner in No. 348 H could not be entirely ignored by the court below and can not be disregarded here. Petitioner can not be heard to say that his writ of error brought up the judgment and sentence in No. 350 H and did not bring up that in 348 H. In 348 H, therefore, he stands convicted and sentenced. The sentence has been affirmed by the court below, and his subsequent proceedings there and here in no way attack the validity of the judgment affirming that sentence. In whatever light considered, the question presented is moot.

CONCLUSION.

It is, therefore, respectfully submitted that petitioner was properly convicted, that the court sustaining his conviction was properly constituted, and that the judgment should be affirmed.

JAMES M. BECK,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Attorney.

DECEMBER, 1923.

○